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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1812

KENNETH ROBERTS, *et al.*,

Appellants,

v.

CECIL D. ANDRUS, Secretary,
United States Department of the Interior,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Kenneth Roberts, et al., petition this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

This case comes before the Court in two Dimensions. The First dimension deals, indirectly, with a certain judgment and order entered by the United States Court of Appeals for the Tenth Circuit on the question of jurisdiction. In United States of America, Plaintiff v. Merle I. Zweifel, et al., Defendants, Civil Action No. 5784, brought in the United States District Court for the District of Wyoming, that Court held that a

Federal District Court did have subject matter jurisdiction to entertain an original action brought to cancel out unpatented mining claims and that the government may elect the forum of Her choice whether such Forum shall be the Bureau of Land Management or through the Federal District Court. Appendix 1a to 2a, unreported. The Tenth Circuit Court of Appeals affirmed the District Court's ruling on the question of jurisdicition. Appendix 1b to 8b, reported at 508 F.2d 1150 (C.A. 10, 1975). Petition for Writ of Certiorari was filed in this Honorable Court, Number 74-1410. On October 6, 1975, this Honorable Court denied Certiorari. Reported at 423 U.S. 828 (1975). Appendix 1c. Petititioners have brought the jurisdictional questions before the Court, under this Petition, for the stated reasons that (a) the Tenth Circuit Court of Appeals relied heavily upon Its ruling in 508 F.2d 1150 (C.A. 10, 1975) which ruling is contrary to the trinity of cases deciding the jurisdictional question by this Honorable Court in years past and consistently so. (b) This Honorable Court may well consider the ruling denying certiorari on October 6, 1975 as is reported at 423 U.S. 828 (1975).

The Second dimension deals directly with a judgment and order entered by the District Court affirming a final judgment and order entered by the Interior Board of Land Appeals, printed in the appendix to this petition, pages 1d to 9d. That judgment and order is reported at 389 F. Supp. 87 (1975). Petitioners prosecuted an Appeal to the Tenth Circuit Court of Appeals. On November 19, 1976, the Tenth Circuit Court of Appeals affirmed the judgment and order of the District Court. Appendix 1e to 16e, to be reported at ____ F.2d ____ (C.A. 10, 1976).[1] Petitioners filed a Petition for

[1]Conflicting pursuits of jurisdiction is evidenced by the fact that in 508 F.2d 1150 (1975), the Respondents initiated actions to cancel out unpatented mining claims in the Federal District Court in the first instance, by-passing the Bureau of Land Management. In the present action, Respondents properly initiated the action in the Bureau of Land Management as was consistent with prior decisions rendered by this Court.

rehearing and suggestion for rehearing en banc. On March 15, 1977, the Tenth Circuit Court of Appeals denied both petitions. Appendix 1f.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, affirming the Judgment of the United States District Court for the District of Colorado, was dated and entered on November 19, 1976. The petition for rehearing and suggestion for rehearing en banc was dated and entered on March 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1234(1).

QUESTIONS PRESENTED

(I.) Whether a State Statute which supplements a Federal Statute specifying the exact method of staking an unpatented placer mining claim on lands situated within the public domain is constitutionally burdensome and repugnant and therefore constitutes a denial of equal protection of laws and a denial of due process of law?

(II.) Whether the Rule enunciated by this Court in United States v. Coleman, 390 U.S. 599, 602 (1968), applying the marketability test as complementary to the Reasonable Prudent Man Test in defining "discovery of a valuable locatable mineral" as extended to cover minerals having intrinsic value, should be delineated in its application in order to prevent legally burdensome requirements in proving discovery of minerals such as dawsonite, gibbsite, nordstrandite and nahcolite, which are commingled with a kerogenbaring dolomite termed "oil shales" underlying most, if not all, of the Piceance Creek Basin of the Green River Formation?

(III.) Whether the refusal of a District Court and Court of Appeals to apply the Doctrine of Laches to actions or inactions by the United States of America in prosecuting, timely, administrative actions aimed at cancelling out unpatented placer mining claims constitutes a denial of procedural and substantive due process of law?

(IV.) Whether or not, in a contested mining proceeding brought by the United States of America aimed at cancelling out unpatented placer mining claims, the rule which requires that unpatented placer mining claim holders bear the burden of proof which is contrary to the overwhelming rules of evidence and case law, constitutes a denial of equal protection of laws and a denial of procedural due process of law?

(V.) Whether or not adverse news publicity preceding the commencement of a contested mining claim proceeding brought by the United States of America, renders the proceeding null and void for want of a fair trial at the administrative level?

(VI.) Whether, in a contested mining proceeding brought by the United States of America challenging the validity of unpatented placer mining claims, the right to trial by jury on all issues of fact as to location and discovery, is preserved and should be constitutionally afforded at the Administrative level or, having exhausted those remedies, by a Trial de novo, by Jury, on judicial review in a Federal District Court thereby precluding a Rule 56 Summary Type Judgment?

(VIII.) Whether, in a contested mining claim proceeding brought by the United States of America, challenging the validity of unpatented mining claims containing Dawsonite, Gibbsite, and Nordstrandite which are commingled with the Kerogen-bearing

dolomites known as "Oil Shale", the Government is Estopped in challenging claims based upon questions of discovery and location where geological facts were known to the United States by previous Departmental Decisions declaring "Oil Shale" a valuable mineral under the Mineral Location Act of 1872 and where the claims involved are located by United States Geological Survey's Rectangular Method in which case the Government would not, according to prior case law, inquire into compliance with State Law?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution.
Fourteenth Amendment, United States Constitution.
Seventh Amendment, United States Constitution.

STATUTES INVOLVED

5 U.S.C. 556(d), provides as follows:

"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

30 U.S.C. 22, provides as follows:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States."

30 U.S.C. 28, provides as follows:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced . . ."

30 U.S.C. 35, provides as follows:

". . . where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys . . ."

30 U.S.C. 162, provides as follows:

"All unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, shall be subject to location and purchase under the provisions of the law relating to placer-mining claims."

FEDERAL REGULATIONS INVOLVED

43 C.F.R. 1852.2-1, provides as follows:

"The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim."

43 C.F.R. 3831.1 (1969), provides as follows:

"A location is made (a) by staking the corners of the claim except placer claims described by legal subdivision where State law permits location without marking the boundaries of the claim on the ground . . ."

STATE STATUTES INVOLVED

Colorado Revised Statutes, 34-43-112 (1973), provides as follows:

"(a) Before filing the location certificate the discovers shall locate his claim.

(b) By posting upon such claim a plain sign or notice, containing the name of the claim, the name of the locator, the date of discovery and the number of acres or feet claimed;

(c) By marking the surface boundaries with substantial posts, sunk into the ground, one at each angle of the claim."

STATEMENT OF THE CASE

On August 7, 1968 and, as amended, on April 25, 1969 and June 12, 1969, the Respondents brought an action in the Bureau of Land Management challenging the validity of approximately 2,910 associated placer mining claims. These claims are located in Garfield and Rio Blanco Counties, Colorado. Geologically, the areas have been identified as the Piceance Creek Basin, Green River Formation, Colorado. The Piceance Creek Basin is well known for its kerogen-bearing dolomites termed as "Oil Shales". Oil Shale is found abundantly throughout the Piceance Creek Basin and the dolomites are commingled with a carbonate of alumina and sodium called dawsonite, gibbsite, and nordstrandite. These kerogen-bearing dolomites are known, mineralogically, as the Host Rock or Matrix. Alumina cannot be extracted from the kerogen-bearing dolomites, also known as "Marlstone", without doing damage to the Matrix and, vice-versa, Oil Shale cannot be extracted from the Marlstone without doing damage to the alumina bearing compounds known as dawsonite, gibbsite, and nordstrandite.

Petitioners filed an Answer to the Complaint and the cause proceeded to Administrative Hearing before the Administrative Law Judge. On February 25, 1972, the Administrative Law Judge ruled that (a) the claims had not been located in accordance with the mining laws and, (b) Petitioners had failed to show a valid discovery of a valuable, locatable mineral. The claims were declared null and void.

Petitioners thereafter filed and prosecuted an appeal before the Interior Board of Land Appeals. That Board sustained the Administrative Law Judge's Ruling. The decision and ruling by the Interior Board of Land Appeals is reported at 11 I.B.L.A. 53 (1973). Appendix 1g to 22g.

Petitioners filed a Complaint in the United States District Court for the District of Colorado, seeking a review of the judgment and decision entered by the Interior Board of Land Appeals. The Respondents filed a Motion for Summary Judgment under *Rule 56, Federal Rules of Civil Procedure.* Petitioners filed extensive briefs and opposition thereto. On January 23, 1975, the District Court held that the evidence adduced by the Respondents sustained the finding that alumina was not present in the claims in quantities sufficient for economic and commercial extraction and marketing and that the claims were not sufficiently marked. The Court further ruled that the record demonstrated that the proceedings before the administrative law judge did not deny the claimants due process. Appendix d-1 to d-9, reported at 389 F. Supp. 87 (1975). An appeal was filed in the Tenth Circuit Court of Appeals from the decision and order entered by the District Court, granting Summary Judgment to the Respondents.

On November 19, 1976, the Tenth Circuit Court of Appeals entered a decision and order affirming the District Court's decision. Appendix 1e to 16e, reported at ____ F.2d ____, (1976). Petitioners filed a petition for rehearing and suggestion for rehearing en banc. That petition was likewise denied on March 15, 1977, Appendix 1f. It is from that final ruling by the Tenth Circuit Court of Appeals that Petitioners have filed a Petition for Certiorari in this Honorable Court.

STATEMENT OF FACTS

Petitioners were the owners, in part, of approximately 2,910 unpatented mining claims. The claims are situated in the Piceance Creek Basin of the Eocene Green River Formation, Colorado. This vast and extensive Basin is well known for its kerogen-bearing dolomites known as "oil shale" and often referred to as "Marlstone". Throughout the entire strata of the Basin, the minerals Dawsonite, Gibbsite and Nordstrandite as well as Nacholite are found. These minerals contain an abundant supply of alumina and other valuable minerals. The minerals are commingled with the Marlstone. So commingled are the minerals that, technically, the Host Rock or Matrix might well be considered the dawsonite, gibbsite, nordstrandite and nacholite compounds rather than the Marlstone. The history of oil shale and its value is well known to the Honorable Court.[2]

Between May 2, 1966 and February 10, 1967, approximately 2,910 unpatented mining claims were located in the Piceance Creek Basin by an agent and locator for petitioners. These claims were located consistently over a wide area of oil shale properties and the mineral, alumina, is commingled with the oil shale or marlstone. The claims were duly staked by U.S.G.S. Rectangular Method and in some instances, claims were staked by posting a marker or monument at each angle of the claims. Location certificates were duly executed and filed in the local county recorders offices in Meeker, Garfield and Rio Blanco Counties, Colorado. Notably, the claims were located on lands which were well known, as common knowledge, for their intrinsically valuable minerals such as dawsonite, gibbsite, nordstrandite and nacholite from which alumina could be extracted and marlstone from which shale oil could be extracted at distillation by use of the *in situ* or *retort* methods.

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[2] This Court decided one aspect of oil shale cases dealing with the assessment work issue in *Hickel v. TOSCO,* 400 U.S. 48 (1970).

Of importance to the Court is the background or mineralogy of the Piceance Creek Basin since Respondents placed the Onus upon Petitioner to prove that which they already knew as common knowledge. The mineral, Dawsonite, was first identified in cores from the Piceance Creek Basin by Dr. Charles Milton, then of the U.S. Geological Survey.[3] This identification was made by Dr. Milton in 1958. Subsequent to the identification by Dr. Milton, Hite and Dyni conducted further research and found the Piceance Creek Basin to contained Dawsonite and Nacholite which are potentially valuable sources of alumina and soda ash.[4] According to another survey conducted by Drs. DeVoto, Stevens and Bloom,[5] the following finds were made as to value:

> "The occurrence of gibbsite ubiquitously with dawsonite was originally suggested by the fact that in many units there is considerably more dilute-acid-soluble aluminum than sodium."
>
> . . .
>
> "The continuous intervals averaging greater than 1.5 and 2.8 percent aluminum have a minimum gross value in the ground of about $8 and $14 per ton soluble extractable aluminum, respectively, using a value for aluminum of 25 cents per pound . . . The gross value, in place, of the kerogen contained in this same zone (averaging 25 gallons of oil per ton) is approximately $1.75 per ton. The ultimate value of this rock could be controlled more

[3]Milton, Charles, and Smith, J.W., 1966. Dawsonite in the Green River Formation of Colorado: Econ. Geol. v. 61, no. 6, pp. 1029-1042.

Milton, Charles, and Eugster, H.P., 1959. Mineral Assemblages of the Green River Formation in Researches in Geochemistry, ed. P.H. Ableson: John Wiley and Sons, New York, pp. 118-150.

[4]Hite, R.J. and Dyni, J.R., 1967. Potential resources of dawsonite and nacholite in the Piceance Creek Basin, Northwest Colorado: 4th Annual Oil Shale Symposium, Colo. School of Mines Quarterly, v. 62, no. 3, pp. 25-38.

[5]Bloom, DeVoto and Stevens (May, 1970). Dawsonite and Gibbsite in the Green River Formation: Mines Magazine. (Professors of Geology at Colorado School of Mines.

> by its value as aluminum ore than by its value as a source of oil. Every square mile (of the 150 square miles) that has a 500 foot thickness of continuously interval averaging 1.5 percent of aluminum contains between 3/4th and 1 billion tons of potential ore."

By all accounts, based upon studies conducted by the United Geological Survey, The Bureau of the Mines and the Atomic Energy Commission, the foregoing findings have been substantially confirmed and these technical facts were well known to the respondent, even on the date when respondents first filed a complaint challenging the validity of the 2,910 unpatented placer mining claims.

On August 7, 1968, the government filed a complaint (as amended April 25, 1969, and June 12, 1969) challenging the validity of the unpatented placer mining claims. In the complaint, the Government charged (1) that the claims were not located in accordance with the mining laws, and (2) there was no discovery of a valuable, locatable mineral deposit within the meaning of the mining laws within the limits of *any* of the claims. However, prior to the filing of the complaint, through various press releases, adverse information was transmitted to the Press concerning the Department of Interior's stand in proclaiming the invalidity of the 2,910 mining claims. For example, in March, 1968, the Washington Post Reported:

> "MINING CLAIMS CLEARED FOR OIL New York Times Service WASHINGTON – The department of the interior Tuesday wiped out 5,200 mining claims on the oil-rich shale lands of Colorado and Utah . . ."

The Wall Street Journal reported:

> "More than 5,000 mining claims on shale lands in Utah and Colorado have been wiped out by Interior Dept., solicitor Edward Weinberg. The claims, most of which were filed in the past couple of years, were chiefly on federally owned lands that contain shale oil reserves. Weinberg ruled that dawsonite (a mineral mixed with much of the shale) is not subject to claims.

> The move was the latest in a series designed to clear title to shale oil lands in Colorado, Utah and Wyoming so that oil extraction may get under way. About 80% of the land is owned by the federal government. Literally thousands of other claims still are in dispute."

While proclaiming, prior to actual trial, that the claims had been administratively "wiped out" by the Interior Department's Solicitor, Walter R. Hibbard, Jr., Director of the U.S. Bureau of Mines, in testimony at a closed hearing before a house appropriations subcommittee, told the Congress that "Oil shale may contain enough aluminum-bearing minerals to meet the nation's aluminum needs for years – plus trillions of dollars worth of oil."[6]

The facts in the administrative record, documented by substantial evidence, proved, inter alia, the following:

That during the years 1965 and 1966, the Contestees hired an Agent-Locator, one Merle I. Zweifel, for purposes of locating the 2,910 unpatented placer mining claims situated in the Piceance Creek Basin, Colorado. That the Locator did in fact enter upon the lands and posted location notices on each claim setting forth the names of each locator on the claims. The claims notices were in fact executed and filed for recordation with the County Courthouses in Meeker, Colorado and at the County Courthouses in Garfield and Moffat Counties, Colorado. The actual method of staking each claim consisted of making "Y" stakes and placing the stakes at each angle of the claim, in most instances. Photographs were taken as evidence of staking.

The claims are situated within a 250 square mile radius and have a 500 foot thickness of continuous interval averaging 1.5 percent aluminum which contains between 3/4ths and 1 billion tons of potential ore. The 1.5 percent aluminum mentioned can be processed from approximately 40 billion tons of alumina *which can be extracted from each acre.* (emphasis supplied). Private Industry had perfected methods

[6] Reported in The Daily Oklahoman, Sat. April 13, 1968.

or processes on which patents have been issued, by which alumina could be extracted from dawsonite, gibbsite, nordstrandite and analcite. Alumina is an intrinsically valuable mineral and approximately 36 out of 50 states are considered primary alumina markets in the United States. Transportation from the site of the mine to the market can be accomplished by use of horizontal methods or the market can move close to the point of primary production. In considering the value of alumina in place, (in the ground), approximately 1.5 and 2.8 percent aluminum have a gross value in the ground of about $8.00 to $14.00 per ton. By use of various extraction processes, one could recover 132 pounds of alumina from each 200 pounds of gibbsite, nordstrandite. By use of various extraction processes, one could recover 700 pounds of alumina from 2,000 pounds of dawsonite. Projection has it that the demand for alumina will continue to increase by a substantial percentage within the next ten years. These were the facts before the Administrative Agency and, on judicial review, before the Federal District Court and the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The inconsistencies in subsequent decisions emanating out of various Federal Circuit Courts, after this Court's ruling on jurisdiction in *Best v. Humboldt Placer Mining Company*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920); *Brown v. Hitchock*, 173 U.S. 473, 19 S. Ct. 485 (1899); *Northern Pac. R. Co. v. McComas*, 39 S. Ct. 546 (1918); *Boesche v. Udall*, 373 U.S. 472, 83 S. Ct. 1373 (1963), are clearly representative of an incorrect interpretation of the law. The rule is well settled that subject matter jurisdiction involving unpatented mining claim litigation is vested solely in the Secretary of the Interior, acting through the Bureau of Land Management and not the Federal Courts

in the first instance. In *United States of America v. Zweifel & Roberts, et al.*, 508 F.2d 1150 (1975), the Tenth Circuit Court of Appeals upheld a District Court ruling invoking jurisdiction in the first instance. This Honorable Court denied certiorari, 423 U.S. 829 (1975). In view of the fact that *United States v. Zweifel & Roberts, supra,* is an adjunct proceeding to the litigation before this Court, review of that ruling appears timely as well as proper. Furthermore, the Tenth Circuit Court of Appeals, cited *United States v. Zweifel, supra,* approvingly, even though incorrectly, in its decision from which this Petition for Certiorari is taken.

II. The rule enunciated by this Court in *United States v. Coleman,* 390 U.S. 599, 602 (1968) has been misinterpreted by the Circuit Courts throughout the United States. In *Coleman, supra,* this Court held that in order to determine whether a mineral is a "valuable mineral deposit" under 30 U.S.C. 22, it must be shown that the mineral can be extracted, removed and marketed at a profit. The Marketability Tests enunciated by the Court in *Coleman, supra,* is complementary to the "Reasonable Prudent Man Test" which provides that where minerals found are of such character and quantity and quality that a person of ordinary prudence would be justified in further expenditure of labor and means, with a reasonable prospect of developing a paying mine. *Christman v. Miller,* 197 U.S. 313, 25 S. Ct. 468 (1905); *Cameron v. United States,* 252 U.S. 450, 40 S. Ct. 410 (1919); *Castle v. Womble,* 19 L.D. 455 (1894); *Cole v. Ralph,* 252 U.S. 286, 40 S. Ct. 321 (1920); *Davis v. Wiebold,* 139 U.S. 507 (1891); *Lindley on Mines,* 3rd ed., Sec. 336. The question with which the Court is called upon to deal is not whether the Marketability Test enunciated by this Court in *Coleman, supra,* is complementary to the Reasonable Prudent Man Test, but rather, whether or not the need for a showing that a market exists is mandatory where minerals having intrinsic value, of wide-spread occurrence, would justify a reasonable prudent man in expending time, labor, effort and resources in developing a paying mine. Contrary to subsequent

holdings or decisions by Federal Courts after *Coleman, supra,* alumina is a mineral having intrinsic value with a readily available market. Accordingly, the requirement that litigants in mining claim contests must demonstrate that a market does in fact exist is legally burdensome and constitutes a denial of equal protection of the laws.

It must be remembered that *Coleman, supra,* came before this Court on litigation involving quartzite deposits which the litigants claimed rendered the lands valuable for building stone. In the cause now on Petition for Certiorari, the mineral lands are chiefly valuable for alumina, an intrinsically valuable mineral, as well as marlstone or kerogen from which oil shale can be extracted. *Coleman, supra,* must be placed in proper perspective. This Court did not intend that the Marketability Test be applied in all cases involving all minerals. This interpretation is borne out by the fact that the Court elaborated fully as follows:

> "... the prudent man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, and sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit." *id.* 603

The Agency, the District Court and the Tenth Circuit Court of Appeals applied a standard which was not required under the geological significance of the mineral claims involved.

III. The refusal of the District Court and the Court of Appeals to apply the doctrine of laches or Estoppel to actions or inactions by the United States constituted a denial of procedural and substantive due process of law.

In cases emanating out of the Tenth Circuit, the Court has held that the doctrine of estoppel may be applied against the government. *Atlantic Richfield Co. v. Hickel,* 432 F.2d 587,

at 591-592 (10th Cir., 1970). There is further authority for the view, in the Federal Courts, that government can be estopped by the conduct of its agents, within the scope of their authority. *Interstate Fire Ins. Co. v. U.S.*, 215 F. Supp. 586 (E.D. Tenn. 1963), affd., 339 F.2d 603 (6th Cir., 1964); *U.S. v. Certain Parcels of Land*, 131 F. Supp. 65 (S.D. Cal., 1955). More particularly, in cases involving disputes arising out of the administration of public lands, and where the government acts in a proprietary capacity rather than a sovereignty, the doctrine of estoppel has been applied. *Brandt v. Hickel*, 427 F.2d 57 (9th Cir., 1970); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, (9th Cir., 1970). In other cases, the Secretary of the Interior has been collaterally estopped from disavowing official advice (such as failure to acknowledge technical facts derived from agency expertise in research such as facts derived from Bureau of the Mines, the Atomic Energy Commission, and U.S. Geological Survey) relating to the extensive mineral contents of the mineral lands involved in this Proceeding. *Seaton v. Texas Co.*, 103 U.S. App. D.C. 163, 256 F.2d 718; *Chapman v. El Paso Natural Gas*, 92 U.S. App. D.C. 154, 204 F.2d 35. Certainly, the Secretary of the Interior cannot ignore technical facts which he is bound to have knowledge of.

Accordingly, failure to apply the doctrine of estoppel and laches constituted a denial of procedural due process of law.

IV. The time worn rule, which is contrary to procedural and adjective law, has been stated as follows: When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and the burden of proof shifts to the claimant to show by a preponderance of evidence that his claim is valid. The rule is further stated that in an Administrative Contest challenging the invalidity of placer or lode mining claims, the burden of proof is borne by the proponent of a rule or order. 5 U.S.C. 1006, 60 Stat. 241 (1946); *Foster v. Seaton*, 106 U.S. App. D.C. 253, 271 F.2d 836 (D.C. Cir., 1959); *United States v. Strauss, et al.*, 59 I.D. 129 (1945). The

constituttional validity of the rule has never been tested in this Honorable Court. The question therefore abounds – whether in an administrative contest, where the government challenges the validity of unpatented mining claims, she must bear the burden of proof throughout the adversary proceeding?

The holding in *Foster v. Seaton, supra,* even though incorrect, was again applied and followed by the Tenth Circuit Court of Appeals in *United States v. Zweifel, supra,* and the rule has again been followed in the case from which Certiorari has been filed with this Court. Firstly, the Secretary of the Interior, is the proponent of a rule or order in a contested mining claim proceeding. The fact that a Statute or Regulation asserts an affirmative fact and/or requirement and the Secretary challenges that fact, by way of a negative pregnant, does not relieve the Secretary of carrying the Burden of Proof. For comparison, cf. *Kerner v. Flemming*, 283 F.2d 916, 922 (2nd Cir., 1960). A reading of Section 556(d) 5 U.S.C., provides as follows:

> "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

The Committee Reports suggest that the proponent of a rule or order has the burden of proof *means* not only that the party initiating the proceedings has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.[7] The Burden of Proof assigned to the Secretary is well nigh supported by the fact that upon review of administrative decisions by federal courts, all decisions must be supported by substantial evidence in the Administrative Record. *Nickol v. United States*, 501 F.2d 1389 (10th Cir.); *Roberts v. Morton*, 389 F. Supp. at 90; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (6th Cir.); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-88; *Mandrell v. Weinberger*, 511 F.2d 1102 (10th Cir.).

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[7]Sen Doc. No. 248, 79th Cong., 2d Sess. 208, 270 (1946).

The imposition of burden of proof upon claimants of mineral lands in proceedings brought by the government would indeed constitute and does constitute a denial of equal protection of the laws and a denial of due process of law.

V. This court first enunciated the rule condemning adverse news publicity *Sheppard v. Maxwell,* 384 U.S. 33 (1966). The practice was further condemned by the Court of Appeals in *F.R.C. v. Cinderella Career and Finishing School, Inc.,* 404 F.2d 1308 (1968). Yet, the Court of Appeals has dealt with the problem lightly by simply concluding that a showing of personal bias is required and the fact that the administrative law judge indicated that he was unaware of any adverse prehearing publicity concerning the claims and therefore his determination was not tainted. But contrary to a summary conclusion arrived at by the Court, there was an inherent demonstration, by virtue of the obvious results, that there was indeed a prejudgment on the merits of the issues in the proceedings. Environmental Defense Fund, Inc. v. Environmental Protection Agency, 510 F.2d 1292, 1305 (D.C. Cir.); *Kennecott Copper Corporation v. FTC,* 467 F.2d 67, 79-80 (10th Cir.). That prejudgment cannot and should not be lightly taken particularly where valuable property rights are involved. *Union Oil of California v. Smith,* 249 U.S. 337 (1919); *Belk v. Meagher,* 104 U.S. 279 (1881); *Wilbur v. U.S.,* 46 F.2d 217 (1930); *Cole v. Ralph,* 252 U.S. 286, 40 S. Ct. 321 (1920); *Christman v. Miller, supra; Ickes v. Virginia-Colorado Dev. Corp.,* 295 U.S. 639 (1939); *Manuel v. Wulff,* 152 U.S. 505.

This Court has held that hearings which are held in a trial atmosphere that has been utterly corrupted by press coverage and which precedes an adverse decision should be overturned. *Irvin v. Dowd,* 366 U.S. 717 (1961); *Rideau v. Louisiana,* 373 U.S. 723 (1963); *Estes v. Texas,* 381 U.S. 532 (1965).

VI. There is a conflict of decisions as to whether one who locates unpatented mining claims on lands within the Public Domain, must not only stake his claims in accordance with

the Federal Law but must follow the exact method of staking as required by State Laws.

The Tenth Circuit Court of Appeals held that Petitioners, in staking the claims involved, should have followed the dictates of the Colorado State Statutes. The Federal Law Provides that a Locator may stake his claim by following the U.S.G.S. Rectangular Method which does not require that the locator sink a post at each angle of the claim so long as the claims can be identified by permanent government markers or monuments. 30 U.S.C. 35; 43 C.F.R. 3401.1; 43 C.F.R. 3831.1. The rule is well settled that in a proceeding between the government and a private mining claimant, the Land Department will not inquire as to his compliance with the local laws and regulations specifying the manner in which the location should be marked on the ground. *Reins v. Murray,* 22 L.D. 409 (1896); *Instructions, Location of Oil Shale Placer Claims,* 52 I.D. 631 (1929); *McKinley Creek Mining Co. v. Alaska United Mining Co.,* 183 U.S. 563, 569 (1902). On the other hand, the Colorado Statute provides that the Locator mark the surface boundaries with substantial posts, sunk into the ground, one at each angle of the claim. C.R.S. 34-43-112 (1973). But the Department has never overruled its decision in *Reins v. Murray, supra.* Thus, where the Department reversed its field of directions and placed the burden upon petitioners to demonstrate that they must comply with State Law constituted a denial of equal protection of laws and a denial of due process of law.

The rule is well settled that the location must be distinctly marked upon the ground so that its boundaries can be readily traced. But the law is not now in a settled state in light of the Tenth Circuit Court's ruling in *Roberts v. Morton, supra.* In *McKinley Mining Co. v. Alaska Mining Company, supra,* this Court held that a location on unsurveyed lands was valid where there was only one monument, a stump, and that the stump could readily provide a basis or monument from which the claim could be readily traced. According to some authorities, the California Courts take the position that simply

complying with Federal Law does not satisfy the requirements of State Statutes. In the leading case of *White v. Lee*, 78 Cal. 593, 596, 21 Pac. 363, The Court so held. But White *v. Lee* was overruled in *Kern Oil Co. v. Crawford*, 143 Cal. 298, 76 Pac. 1111, 1113 (1903). *Kern, supra,* was adopted and followed by the Department of Interior in *Reins v. Murray, supra.* See *Lindley on Mines,* Vol. 2, Sec. 454 (1914).

Petitioners call upon this Honorable Court to settle the state of the law insofar as compliance with State Statutes are concerned in contested mining claim proceedings initiated by the Government. Seemingly, the Government would know where the boundaries or permanent markers identifying each rectangle is situated thereby precluding the necessity of a locator showing that the claim can be readily traced.

VII. In a contested mining proceeding brought by the United States of America before the Land Department, and, upon judicial review, a Trial Court is duty bound to grant a Trial by Jury, de novo, where there are genuine issues of material fact in dispute which would preclude a Rule 56 Summary Type Judgment.

While the Administrative Procedure Act, 5 U.S.C. 101, *et seq.* does not provide for Jury Trial on Judicial Review, a Federal District Court cannot, constitutionally, render a Summary Judgment ruling by simply examining the entire administrative record in order to ascertain whether the Agency's decision is supported by substantial evidence in the Administrative Record. *Nickol v. United States, supra.* The usual practice in Federal Courts, on judicial review, is to render a Summary Judgment without benefit of a trial by jury in order to weigh all genuine issues of material fact in dispute. One school of thought has it that in Administrative Proceedings, jury trials are not guaranteed. Nonethelesss, under the *Seventh Amendment of the U.S. Constitution,* a claim having value based upon the minerals found within the confines of each claim and the well settled property right concept clearly delineate the action as one sounding in the nature of a suit at common law, thus satisfying the

requirements of the *Seventh Amendment.* The common law concept of an unpatented mining claim labeled as property in the fullest sense of the word has been well settled. This Court has held that a mining claim, unpatented, perfected under the law is property in the highest sense of that term. *Cole v. Ralph, supra; Union Oil of California v. Smith, supra; Manuel v. Wulff, supra; Ickes v. Virginia-Colorado Dev. Corp., supra.*

The jury trial concept at the Administrative Level and on Judicial Review does not come as a procedural hybrid. The title of hearing officer from Hearing Examiner to "Administrative Law Judge" has been effected pursuant to order of the Civil Service Commission, 37 F.R. 16787 (Aug. 19, 1972). Court Rooms have been devised within each Administrative Agency. The setting points out much more, in physical plant, which is compatable to the full jury trial system rather than the former 'informal' administrative hearing room. If, according to *Nickol v. United States, supra,* a trial judge is required to weigh all of the evidence, draw inferences from all of the facts, a litigant is well foreclosed from fully contesting the factual issues which, in any event, should be heard by a jury of peers as a common law action.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari to review the Decision of the United States Court of Appeals for the Tenth Circuit be granted; That an Order to that effect be entered, and the Court below and the Counsel be notified of the Granting of the Petition.

Respectfully submitted,

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In the Supreme Court of the United States

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v.

CECIL D. ANDRUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Department of the Interior Board of Land Appeals (Pet. App. 1g-35g) is reported at 11 IBLA 53. The opinion of the court of appeals (Pet. App. 1e-12e) is reported at 549 F. 2d 158. The opinion of the district court (Pet. App. 1d-16d) is reported at 389 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1976 (Pet. 3; Pet. App. 1e-12e) and a timely petition for rehearing was denied on March 15, 1977 (Pet. 3; Pet. App. 1f). The petition for a writ of certiorari was filed on June 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]In an apparent typographical error, petitioners refer (Pet. 3) instead to 28 U.S.C. 1234(1), which does not exist.

QUESTION PRESENTED

Whether the Secretary of the Interior properly invalidated 2,910 mining claims located for alumina because the alumina cannot now be commercially extracted by any known method and because mining location prerequisites were not satisfied.

STATEMENT

The United States issued an administrative complaint contesting the validity of 2,910 association placer mining claims located in the Piceance Creek Basin in Colorado (Pet. App. 6g). The claims, which covered about 400,000 acres of land, had allegedly been located by Merle I. Zweifel, as agent for more than 250 co-locators (Pet. App. 6g). At the administrative hearing, claimants asserted that the claims were located for alumina (Pet. App. 6g). Alumina is the source compound for aluminum metal and does not occur freely in nature; it is found as a constituent oxide of other minerals (Pet. App. 11g). The Piceance Creek Basin contains vast oil shale deposits (Pet. App. 11g).[2]

Based upon the uncontroverted testimony at the administrative hearing that the alumina in the claims could not be economically extracted and marketed by any presently known technology, the Administrative Law Judge found that the Zweifel claims did not meet the test of present marketability under the mining laws (Pet. App. 11d). Accordingly he held the claims invalid for lack of discovery of a valuable mineral deposit. The Administrative Law Judge also held that the mineral claimants failed to comply with the staking and notice-posting requirements of the mining laws (Pet. App. 6e-7e).

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[2]The claims were not located for oil shale presumably because Section 21 of the Mineral Leasing Act of 1920, 41 Stat. 445, as amended, 30 U.S.C. 241, made oil shale a leasable, rather than a locatable, mineral (Pet. App. 6g).

The Interior Board of Land Appeals, acting for the Secretary of the Interior, affirmed the Administrative Law Judge's decision, 11 IBLA 53 (Pet. App. 3e). The district court entered summary judgment in favor of the Secretary (Pet. App. 1d-16d).

On appeal the Tenth Circuit held that (1) the district court had properly granted summary judgment against petitioners; (2) the record sustained the finding that petitioners' location procedure did not comply with applicable state law; (3) petitioners' mining claims were invalid for failure to establish a valuable mineral deposit, since no known process exists whereby alumina can be commercially extracted from the oil shale host rock; and (4) the contest proceeding was neither barred by laches, nor tainted by unfair publicity or administrative bias and prejudice (Pet. App. 1e-12e).

ARGUMENT

The decision of the court of appeals is correct and is supported by a long history of consistent administrative and judicial construction of the relevant statutes. It does not conflict either with any decision of another court of appeals or of this Court.

1. Petitioners contend that they were not required to demonstrate the marketability of the alumina, because it is intrinsically valuable (Pet. 14-15).

Unpatented mining claims become valid only after the discovery of a valuable mineral deposit within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295; *Cameron* v. *United States*, 252 U.S. 450, 456. What constitutes such a discovery is determined by the "prudent man rule." This rule was set forth in *Chrisman* v. *Miller*, 197 U.S. 313, 322, as follows:

> Where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

In *United States* v. *Coleman*, 390 U.S. 599, 600, this Court approved as a "refinement" to the prudent man test the so-called "marketability" test under which a claimant must show that the mineral can be "extracted, removed and marketed at a profit." The marketability test is a complementary, rather than a distinct, standard (*id.* at 603) and, contrary to petitioners' suggestion, it applies to all minerals, regardless of intrinsic value. *Converse* v. *Udall*, 399 F. 2d 616, 621 (C.A. 9), certiorari denied, 393 U.S. 1025.

Since the uncontroverted evidence established that the alumina in the claims here involved cannot now be extracted commercially by any known method, the court of appeals correctly concluded that there was no discovery of a presently valuable mineral deposit under the mining laws.

2. Petitioners also contend that there is a conflict among various decisions as to whether one who locates a mining claim must satisfy state as well as federal law as to staking requirements (Pet. 18-20). In light of Point 1, *supra*, there is no occasion to reach that contention in this case. In any event, the relevant federal regulation, 43 C.F.R. 3831.1, requires (with an exception not here material) that the corners of the claim be marked by stakes. Since Zweifel himself testified that he had not staked the corners of each claim (Pet. App. 8e), the court of appeals correctly concluded that the claims were not marked in accordance with the applicable federal regulations.

3. Petitioners urge that requiring the claimant to prove the validity of his claim once the Secretary has established a *prima facie* case of invalidity violates the Administrative Procedure Act and deprives the claimant of due process (Pet. 16-18). Since the claimant is the proponent of a ruling that he has satisfied the mining laws and established a valid claim, he properly bears the burden of establishing the validity of his claim once the government has made a *prima facie* showing of invalidity. See *e.g.*, *United States* v. *Zweifel*, 508 F. 2d 1150, 1157 (C.A. 10), certiorari denied *sub nom. Roberts* v. *United States*, 423 U.S. 829;[3] *Foster* v. *Seaton*, 271 F. 2d 836, 838 (C.A. D.C.); *United States* v. *Springer*, 491 F.2d 239, 242 (C.A. 9).

4. Petitioners also argue (Pet. 15-16) that laches should bar the United States' contest to their claims. As the court of appeals recognized, no facts exist which would warrant the application of that doctrine here (Pet. App. 10e-11e). The claims involve 400,000 acres of land. Zweifel filed the claims during the period beginning in May 1966 and extending through February 1967. The government's contest proceeding was initiated August 7, 1968 (Pet. App. 10e-11e). The United States thus contested the claims with due diligence.

5. Petitioners attack the fairness of their hearing before the Administrative Law Judge and the Interior Board of Land Appeals (IBLA) (Pet. 18). As the court of appeals observed, the Administrative Law Judge was unaware of

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[3]Petitioners contend that certiorari should be granted in this case to review the ruling in *Zweifel* (Pet. 13-14). However, that case, which concerned mining claims in Wyoming, is not as petitioner asserts (Pet. 14) an adjunct to this proceeding, and the ruling there—that the government may challenge the validity of an unpatented mining claim by bringing suit to quiet title—is not at issue here, where the United States proceeded by means of an administrative complaint.

any pretrial publicity until petitioners mentioned it, and there has been no showing that the publicity affected his determinations (Pet. App. 11e). Nor did the published statements indicate any prejudgment by the IBLA (Pet. App. 11e). Thus, there was no basis for a finding that the administrative decisions lacked fundamental fairness.

6. Finally, petitioners contend that they were entitled to a jury trial *de novo* (Pet. 20-21). Although due process requires notice and a hearing in proceedings to determine the validity of a mining claim, it does not require that the hearing be judicial, rather than administrative. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336-340. Congress has entrusted the management of the public domain to the Department of the Interior, and prescribed an administrative process for the determination of claims against the public domain. *Id.* at 339. This Court has recently reaffirmed Congress' power to create statutory rights and assign their adjudication to an administrative agency. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, No. 75-746, decided March 23, 1977. Judicial review of the IBLA's determination is confined to the evidence contained in the administrative record, and petitioners were not entitled to a trial *de novo* in the district court. See *Camp* v. *Pitts*, 411 U.S. 138, 141-142. The Secretary's decision is conclusive if it is supported by substantial evidence. *Cf. Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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